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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1589

VIOLA N. RICHARDSON, as County Clerk and Registrar of Voters for the County of Mendocino, individually and as a representative of the class of all other County Clerks and Registrars of Voters,

Petitioner,

v.

ABRAN RAMIREZ, LARRY GILL and ALBERT LEE, on behalf of themselves and all others similarly situated, Los Pintos, 7th Step Foundation, Inc. (California Affiliates), Prisoners' Union, and The League of Women Voters of California,

Respondents.

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA SUBMITTED ON BEHALF OF PETITIONER

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SUBJECT INDEX

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. The Equal Protection Clause of Section 1 of the Fourteenth Amendment should not be stretched to encompass convicted felons in derogation of the express exclusion of such a class from the franchise as provided for in Section 2 of the Fourteenth Amendment	2
II. The Supreme Court of California erred when it held that the Equal Protection Clause of the Fourteenth Amendment prevents a state from disenfranchising convicted felons who are otherwise qualified to vote	13
III. The criminal disenfranchising provisions of California Constitution, article II, section 3 and article XX, section 11 are constitutional even though application of those provisions by county clerks and registrars of voters may be in error	15
CONCLUSION	18

TABLE OF AUTHORITIES CITED

CASES

Page

Beacham v. Braterman, 300 F.Supp. 182 (1969) (D.C. S.D. Fla.) affd. 10-20-69 396 U.S. 12 ---- 4, 5, 7, 14

Carrington v. Rash, 380 U.S. 89 (1965) ---- 2, 8, 12

Dunn v. Blumstein, 405 U.S. 330 (1973) ---- 2, 14, 15

Fincher v. Scott, 352 F.Supp. 117 (1972) (D.C. M.D.N.C.), affd. 5-7-73 --- U.S. ---, 36 L.Ed.2d 681, 93 S.Ct. 2151 ---- 4, 5, 8, 14

Green v. Board of Elections (2nd Cir.), 380 F.2d 445 (1967) cert. den. 398 U.S. 1048 (1968) ---- 5, 7, 8–11, 14

Kramer v. Union School District, 395 U.S. 621 (1969) ---- 2

Kronlund v. Honstein, 327 F.Supp. 71 (N.D. Ga. 1971) ---- 7, 14

Otsuka v. Hite, 64 Cal.2d 596 (1966) ---- 10, 15, 16

Oregon v. Mitchell, 400 U.S. 112 (1970) ---- 2, 11–13

Ramirez v. Brown, 9 Cal.3d 199 (1973) ---- 13, 14, 15, 18

CODES

California Elections Code § 350 ---- 17

CONSTITUTIONS

United States Constitution:

Fourteenth Amendment, Section 1 ---- 1, 2, 5, 7, 8, 11, 13, 15, 16

Fourteenth Amendment, Section 2 ---- 1, 2, 3, 5, 6, 7, 8, 11, 13, 15

California Constitution:

Art. II, § 3 ---- 11, 15, 18

Art. XX, § 11 ---- 11, 15

STATUTE

California Statutes of 1865–66, ch. CCLXV, p. 288 ---- 16, 17

MISCELLANEOUS

Avins, *The Reconstruction Amendments' Debates*, 1967 ---- 13

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SUMMARY OF ARGUMENT

Section 2 of the Fourteenth Amendment expressly excludes persons convicted of crimes (felons) from the right to the franchise and, therefore, they are not a class entitled to vote by virtue of the Equal Protection Clause contained in Section 1 of the Fourteenth Amendment. That latter Clause was never intended by the framers of the Amendment to apply to convicted felons and should not now be stretched to permit them

to cast a ballot. This is particularly true in a state like California which has specific statutes providing for a speedy and inexpensive judicial review of each felon's case and situation to determine whether the nature of the crime, length of time since its commission, and rehabilitation of the offender warrant reinstitution of his franchise rights.

ARGUMENT

I. The equal protection clause of Section 1 of the Fourteenth Amendment should not be stretched to encompass convicted felons in derogation of the express exclusion of such a class from the franchise as provided for in Section 2 of the Fourteenth Amendment

In recent years this Court has decided a number of cases in which state imposed restrictions on various aspects of the right to vote have been invalidated under the Equal Protection Clause of Section 1 of the Fourteenth Amendment. See, for example, *Dunn* v. *Blumstein,* 405 U.S. 330 (1973), severely curtailed voter durational residence requirements; *Kramer* v. *Union School District,* 395 U.S. 621 (1969), residence, property owning, or leasing requirement held invalid as related to school district election; *Carrington* v. *Rash,* 380 U.S. 89 (1965), denial of vote to soldier who was bona fide resident held invalid. In none of these cases, however, has any such extension of the right to vote occurred which covers a situation within the language of Section 2 of the Fourteenth Amendment. *Oregon* v. *Mitchell,* 400 U.S. 112 (1970) does invalidate state age requirements over eighteen years because of the

federal Voting Rights Act amendments, but only in national and not state elections.

Section 2 reads:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. *But when the right to vote* at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, *is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime,* the basis of the representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." (Emphasis added.)

Section 2 covers sex, age, alienage, and criminality. Significantly, constitutional amendments have been necessary to require states to permit women to vote and to permit eighteen year olds to vote in state elections. Similarly, it would appear that constitutional amendments are necessary to permit aliens to vote and, as in the instant case, to permit convicted criminals to vote.

In fact, insofar as criminality is concerned, this Court has twice recently had before it the issue of whether a state may constitutionally disenfranchise convicted felons who are otherwise qualified to vote, and in each instance, the Court has affirmed lower three-judge court rulings that such disenfranchisement is constitutionally permissible.

In *Beacham* v. *Braterman,* 300 F.Supp. 182 (1969) (D.C. S.D. Fla.), affirmed without opinion October 20, 1969, 396 U.S. 12, disenfranchising Florida constitutional and statutory provisions were upheld. And in *Fincher* v. *Scott,* 352 F.Supp. 117 (1972) (D.C. M.D.N.C.), affirmed without opinion May 7, 1973, --- U.S. ---, 36 L.Ed.2d 681, 93 S.Ct. 2151, disenfranchising North Carolina constitutional and statutory provisions were upheld.

The rationale in *Beacham* was that such disenfranchisement must be constitutionally permissive because the Justices of the Supreme Court of the United States have on so many occasions used it as an example of what states may do with propriety.

The *Beacham* Court said:

> "The initial question before the Court is whether a state may constitutionally exclude from the franchise persons otherwise qualified to vote who have been convicted of a felony. We hold that the state may do so and that the Florida constitutional and statutory provisions which effect that exclusion are valid.

"The Second Circuit Court of Appeals in Green v. Board of Elections of the City of New York, 380 F.2d 445 (1967), cert. den. 389 U.S. 1048, 88 S.Ct. 768, 19 L.Ed2d 840, recently addressed itself to that question and decided that it presented an insubstantial issue which did not require the convening of a three judge court. We agree with that Court that '[e]ven though the precise issue has not arisen before the Supreme Court, the propriety of excluding felons from the franchise has been so frequently recognized—indeed put forward by the Justices to illustrate what the states *may* properly do—that such expressions cannot be dismissed as unconsidered dicta.' (Emphasis theirs.) (Citations omitted.)

Beacham v. *Braterman, supra,* at pp. 183–184.

In *Fincher,* besides adopting this *Beacham* reasoning, the lower court pointed out that the Equal Protection Clause of the United States Constitution, Fourteenth Amendment, Section 1, must be read in light of Section 2 which expressly permits disenfranchisement of convicted felons without reduction of representation of states in Congress. The Court said:

"We think that a state may constitutionally continue the 'historic exclusion' of felons from the franchise without regard to whether such exclusion can pass muster under the Equal Protection Clause. The U. S. Const. amend. XIV, § 2, provides in relevant part:

> 'But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced . . . .'

"Section 2 expressly allows the exclusion of felons from the franchise without reduction of representation. As early as 1873, it was stated:

> 'This view is assumed in the second section of the fourteenth amendment, which enacts, that, if the right to vote for federal officers is denied by any state to any of the male inhabitants of such state, except for crime, the basis of representation of such state shall be reduced in a proportion specified. Not only does this section assume that the right of male inhabitants to vote was the especial object of its protection, but it assumes and admits the right of a state, notwithstanding the existence of that clause under which the defendant claims to the contrary, to deny to classes or portions of the male inhabitants the right to vote which is allowed to other male inhabitants.'

"*United States* v. *Anthony*, 24 Fed.Cas. No. 14,459, pp. 829, 831 (C.C.N.D.N.Y. 1873). Recently this position has been restated.

'The framers of the Amendment, says the Attorney General, could hardly have intended the general language of § 1 to outlaw a discrimination which § 2 expressly allowed without the penalty of reduced representation. The argument is convincing. We see nothing in the language or in history to support plaintiff's suggestion that "other crimes" meant only a crime connected with the rebellion. The Court's rejection of Mr. Justice Harlan's position that § 2 is the only portion of the Fourteenth Amendment dealing with voting rights, see Reynolds v. Sims, supra, 377 U.S. at 589 [84 S.Ct. 1362, 12 L.Ed.2d 506] in no way indicates it would deny that § 1 of the Amendment cannot be fairly read to prohibit a discrimination which § 2 expressly permits—especially in the light of the Justice's frequent and consistent statements approving voting disqualification for felony.' "[*Green* v. *Board of Elections*] 380 F.2d at 452. *Accord*, Kronlund v. Honstein, 327 F.Supp. 71 (N.D.Ga.1971); Beacham v. Braterman, 300 F.Supp. 182 (S.D.Fla.), aff'd without opinion, 396 U.S. 12, 90 S.Ct. 153, 24 L.Ed.2d 11 (1969). *Contra*, Stephens v. Yeomans, 327 F.Supp. 1182 (D.N.J.-1970). Putting it positively, we think § 1 must be read in light of § 2, and, so read, denial of the franchise to felons is specifically excepted from the Equal Protection Clause contained in § 1.

"While it may be more desirable from a correctional point of view to give felons the right to

vote, Comment, 50 N.C.L. Rev. 903, 909–10 (1972), we are convinced the states are not constitutionally required to do so." *Fincher* v. *Scott,* 352 F.Supp. 117, 119 (D.C.M.D. N.C. 1972).

Additionally, in *Green* v. *Board of Elections* (2nd Cir.), 380 F.2d 445 (1967) this Court denied certiorari (398 U.S. 1048 (1968)) after the Court of Appeals upheld the contention that insofar as the dichotomy between Section 1 and Section 2 of the Fourteenth Amendment existed, the sections were independent and of equal standing, and therefore convicted felons could be denied the franchise by a state acting under Section 2. In *Green* the Court said:

> "Plaintiff places heaviest weight on the equal protection clause of the Fourteenth Amendment, relied upon in such landmark decisions as the apportionment cases, Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L. Ed.2d 821 (1963), and Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); and the voter qualification cases, Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965), and Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). But none of those decisions intimates that the states are without power to continue their historic exclusion from the franchise of persons convicted of all or certain types of felonies. Even though the precise issue has not arisen before the Supreme Court, the propriety of excluding felons from the franchise has been so

frequently recognized—indeed put forward by the Justices to illustrate what the states *may* properly do—that such expressions cannot be dismissed as unconsidered dicta. See, in addition to the statements in Davis v. Beason, 133 U.S. 333, 346–347, 10 S.Ct. 299, 33 L.Ed. 637 (1890), and Estep v. United States, 327 U.S. 114, 122 n. 13, (1946), such recent expressions as those in Trop v. Dulles, 356 U.S. 86, 96–97, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (Warren, C.J.); Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 51, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959) (Douglas, J.); Gray v. Sanders, 372 U.S. 368, 380, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (Douglas, J.); and Harper v. Virginia State Board of Elections, 383 U.S. 663, 673, 675 n. 4, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (dissenting opinion of Black, J.).

"This general recognition rests on the established principle that 'A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.' Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 584, 55 S.Ct. 538, 540, 79 L.Ed. 1070 (1935) (Stone, J.). The early exclusion of felons from the franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society every man 'authorizes the society, or which is all one, the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due'. [Footnote omitted.] A man who breaks the laws he has authorized his

agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact. On a less theoretical plane, it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime. See The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice, 45–47, 187–196 (1967). A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be. There may, of course, be crimes that would not come within the definition of a particular state law on exclusion from the franchise, as the Supreme Court of California thought to be the case in Otsuka v. Hite, 64 Cal.2d 596, 51 Cal.Rptr. 284, 414 P.2d 412 (1966),[8] or which are of such minor significance that exclusion for their commission might raise not only a question of wisdom, as the task force of the President's

[8] Insofar as the opinion of the four member majority went beyond construction of the California Constitution and implied that the Federal Constitution forbade denial of the franchise to violators of the Selective Service Act, we think it without basis. See Note, Constitutional Law, Construction of State Disenfranchisement Rule under Equal Protection Standards, 66 Col.L.Rev. 1357 (1966)."

Crime Commission on Correction has concluded, but even a substantial constitutional question at least if we looked at § 1 of the Fourteenth Amendment alone."

Green v. *Board of Elections, supra,* at pp. 451–452.

The right to vote may include the right to be a candidate. If it does, the specter of convicted criminals voting for district attorneys or judges expounded in *Green,* becomes grossly magnified when the convicted criminals may run or rerun for those same offices. The California constitutional provisions before the Court in the instant matter, article II, section 3,[1] and article XX, section 11,[2] require the State Legislature to deny the franchise to persons "convicted of embezzlement or misappropriation of public money," "bribery, perjury, forgery, or malfeasance in office."

Even Justice Black, who wrote the holding of the Court, in *Oregon* v. *Mitchell,* 400 U.S. 112, 126–127 (1970) recognized that Section 2 of the Fourteenth Amendment might be separated from Section 1, although he did not go as far as did dissenting Justice Harlan. Justice Black said:

[1] "The Legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, person convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money, shall exercise the privileges of an elector in this state."

[2] "Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes. The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice."

"Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race. *Loving* v. *Virginia*, 388 U. S. 1 (1967); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Slaughter-House Cases*, 16 Wall. 36, 71–72 (1873). *While this Court has recognized that the Equal Protection Clause of the Fourteenth Amendment in some instances protects against discriminations other than those on account of race,*[10] see *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Hadley* v. *Junior College District*, 397 U. S. 50 (1970); see also *Kotch* v. *Board of River Port Pilots*, 330 U. S. 552 (1947), and cases cited therein, *it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection.* Nor was the Enforcement Clause of the Fourteenth Amendment

"[10] My Brother BRENNAN relies upon *Carrington* v. *Rash*, 380 U. S. 89 (1965); *Cipriano* v. *City of Houma*, 395 U. S. 701 (1969); and *Evans* v. *Cornman*, 398 U. S. 419 (1970). These typical equal protection cases in which I joined are not relevant or material to our decision in the cases before us. The establishment of voter age qualifications is a matter of legislative judgment which cannot be properly decided under the Equal Protection Clause. The crucial question here is not who is denied equal protection, but, rather, which political body, state or federal, is empowered to fix the minimum age of voters. The Framers intended the States to make the voting age decision in all elections with the provision that Congress could override state judgments concerning the qualifications of voters in federal elections."

intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race." (Emphasis added.)

Oregon v. *Mitchell*, 400 U.S. 112, 126–127 (1970).

Examination of the congressional debates relating to the adoption of the Fourteenth Amendment indicates that none of the congressional debators considered extending the franchise to convicted felons. Avins, *The Reconstruction Amendments' Debates*, 1967. When the words "except for participation in rebellion, or other crime" appear they seem merely tacked on as a matter of course and evidence the complete acceptance of the idea that States undoubtedly could disenfranchise rebels not granted amnesty and felons, an idea which no one questioned when the Fourteenth Amendment was drafted and adopted.

II. The Supreme Court of California erred when it held that the Equal Protection Clause of the Fourteenth Amendment prevents a state from disenfranchising convicted felons who are otherwise qualified to vote.

The Supreme Court of California, in *Ramirez* v. *Brown*, 9 Cal.3d 199 (1973), the case below, failed to realize that the Fourteenth Amendment, Section 2, permits disenfranchisement of persons convicted of rebellion and other crimes and, therefore, erroneously concluded that the Equal Protection Clause of the Fourteenth Amendment, Section 1, prevents a state

on equal protection grounds from disenfranchising any convicted felons who are otherwise qualified to vote.

In reaching its decision, the California Court superficially dismissed the direct holding and philosophical effect of the three major cases *contra: Green* v. *Board of Elections, supra,* 380 F.2d 445 (2d Cir. 1967), cert.den. 389 U.S. 1048 (1968); *Kronlund* v. *Honstein,* 327 F.Supp.71 (N.D. Ga. 1971); and *Beacham* v. *Braterman, supra,* 300 F.Supp. 182 (S.D. Fla. 1969), affd. without opinion, 396 U.S. 12. It rendered its decision without the benefit of a citation to *Fincher* v. *Scott, supra,* 352 F.Supp. 117 (D.C. M.D.N.C. 1972), affd. without opinion, --- U.S. ---, 36 L.Ed.2d 681, 93 S.Ct. 2151, which presumably none of the parties had knowledge of and which had, therefore, not been referred to in the briefs,[3] and it, instead, based its decision almost totally upon a nonfelon voting case for support, *Dunn* v. *Blumstein,* 405 U.S. 330 (1972).

In doing so, and in its equal protection theory reliance on *Dunn,* the Supreme Court of California neglected the caveat therein contained in *Dunn* at page 336:

> "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis

[3] *Fincher* v. *Scott* was decided by the three-judge federal court on December 12, 1972 and affirmed by the United States Supreme Court on May 7, 1973. *Ramirez* v. *Brown* was argued in the California Supreme Court on February 5, 1973 and was decided by that Court on March 30, 1973.

with other citizens in the jurisdiction. [Citations.] This *'equal right to vote,' . . . is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways.* [Citations.] But, as a general matter, 'before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.' [Citations.]" (Emphasis added.)

It is submitted that "close constitutional scrutiny" means utilization of the entire Constitution, including Fourteenth Amendment, Section 2 as well as Section 1. Positive as well as negative aspects must be considered to give full import to the meaning of the *Dunn* case.

III. The criminal disenfranchising provisions of California Constitution, Article II, Section 3 and Article XX, Section 11 are constitutional even though application of those provisions by county clerks and registrars of voters may be in error.

As the California Supreme Court points out in its opinion in *Ramirez* v. *Brown,* the case to which certiorari is directed herein, ever since the decision in *Otsuka* v. *Hite,* 64 Cal.2d 596 (1966) county clerks and registrars of voters in each county have been deciding which specific felonies disenfranchise. While it is true that these county clerks' and registrars' decisions go in many directions, it does not follow, as the California Supreme Court incorrectly ruled, that the

California constitutional provisions under which the disenfranchising occurs are unconstitutional because those provisions are in conflict with the Equal Protection Clause of Section 1 of the Fourteenth Amendment.

Two aspects must be considered which leave the federal constitutionality of the California Constitution provisions untrammelled.

First, is the proposition that if a clerk's or registrar's decision amounts to a denial of equal protection, that denial is a matter of *application* of the California Constitution which may be corrected if necessary. It should be noted in this connection, that *Otsuka* did not suggest that any specific *list* of crimes be formulated by county clerks, but rather that each case be considered on such factors as the nature of the crime, length of time since commission, rehabilitation of the offender, etc. Listmaking by county clerks, utilized as a pragmatic formula in the past, can be prevented by court order without destruction of the underlying State Constitution propositions which have given rise to such activity because of the *Otsuka* case.

Second, that each clerk's decision is in every case subject to a provision for judicial review upon application to the Superior Court of the county. Ever since the enactment of California's first voter registration law in 1866, Stats. 1865–66 Ch. CCLXV, p. 288, there has been an express provision for judicial review of the act of a county clerk who refuses to register any

individual. The remedy has always been quick, simple, and inexpensive.

Section 10 of the original act cited provided:

> "Persons entitled to registration, whose registration shall be refused by the County Clerk, may proceed by mandamus, before any Court having jurisdiction, against such Clerk to procure their registration, but no costs shall be allowed in such proceeding . . . ."

Today, California Elections Code section 350 still provides:

> "If the county clerk refuses to register any qualified elector in the county, the elector may proceed by action in the superior court to compel his registration. In an action under this section, as many persons may join as plaintiffs as have causes of action."

Respondents Ramirez et al. did not see fit to utilize this opportunity for local judicial review in their individual cases, taking excuse in the fact that the California Supreme Court would probably hear their petition for a writ of mandate because it was filed so close to the date of the coming general election.

The situation of which Respondents Ramirez et al. complain can easily be rectified by ordering county clerks and registrars to refrain from mechanical list-making and by suggesting that convicted felons who

may initially be denied the right of the franchise by county clerks or registrars utilize the existing speedy remedy of local judicial review.

In any event, the California Legislature should be given the opportunity to define the meaning of "infamous crime" under the newly enacted amendment to California Constitution, article II, section 3.

CONCLUSION

For the foregoing reasons, the judgment and opinion of the California Supreme Court in *Ramirez v. Brown*, 9 Cal. 3d 199 (1973) should be reversed and overruled.

Respectfully submitted,

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